

STATE OF MICHIGAN
IN THE SUPREME COURT

SHAE KEVIN GRAHAM

Plaintiff-Appellee,

v

SHAREA FOSTER

DefendantAppellant.

Supreme Court No. 152058
Court of Appeals No.: 318487
Lower Court No.: 2013-808521-DP

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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Statement of Question Presented

- I. Whether the Court of Appeals correctly held that a necessary party defendant may be brought into a lawsuit under the Revocation of Paternity Act after the expiration of the statute of limitations period based upon the relation-back doctrine?

Appellant's Answer: No

Appellee's Answer: Yes

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Statement of Facts

This action arises from Plaintiff-Appellee's filing of the instant action as a Complaint for Paternity pursuant to the Revocation of Paternity Act. MCL 722.1431 et seq. [hereinafter may be referred to as "RPA"]. The instant appeal arises from the June 16, 2015 Court of Appeals Order and Opinion which affirmed the denial of Defendant's motion for summary disposition but also concluded that Defendant's husband is a necessary party to Plaintiff's lawsuit. Therefore, the Court of Appeals remanded the matter so that Defendant's husband, Christopher Foster, may be added as a defendant.

Plaintiff-Appellee, Shae Graham, and Defendant-Appellant, Sharea Foster, were high school sweethearts. They reignited an intimate relationship years after high school which resulted in the conception of the minor child, Blake, on or about January 1, 2009. Blake was born on September 23, 2009 at Providence Hospital in Southfield, Michigan. Plaintiff-Appellant, Shae Graham, is the biological father of the child and that fact has been admitted by Defendant-Appellant on several occasions, including sworn testimony. Plaintiff-Appellee was present for all of Defendant-Appellant's prenatal visits and was present for the birth of Blake whereby he even cut the umbilical cord. Christopher Foster, Defendant-Appellant's purported husband, has been listed on the birth certificate of the child, although he is not the biological father and is essentially the "presumed father" under the Revocation of Paternity Act by virtue of being married to Defendant-Appellant at the time of the birth of the child. [Hereinafter may be referred to as "Foster"]. Plaintiff-Appellee and Defendant-Appellant briefly lived together after the birth of the child. Plaintiff-Appellee and Defendant-Appellant carried on a very public relationship for several years prior to the child being conceived in January of 2009. Plaintiff was unaware

that Defendant was married at the time that the child was conceived. It was only by chance that Plaintiff-Appellee was made aware of a communication between Defendant-Appellant and her husband, Christopher Foster, that he confronted Defendant-Appellant and was informed that she was actually married. Plaintiff-Appellee, Defendant-Appellant and the presumed father, Christopher Foster all openly acknowledged that Plaintiff-Appellee was the biological father of the minor child.

Plaintiff-Appellee timely filed the instant Complaint on May 15, 2013 in Oakland County Circuit Court, within the one year effective date of the Revocation of Paternity Act. The action involved the paternity of the minor child, Blake Foster, born September 23, 2009. Plaintiff-Appellee named Sharea Foster, the mother of the minor child, as the Defendant in the matter.

By way of procedural history in this matter, On September 22, 2010, Plaintiff-Appellee had previously filed a paternity complaint against Defendant-Appellant alleging that he was the biological father of the minor child, Blake. He requested that an Order of Filiation be entered establishing paternity of the child. That previously filed matter was dismissed at that time in the Wayne County Circuit Court due to Plaintiff-Appellee's lack of standing to bring an action under the Paternity Act, MCL 722.711. The Michigan Legislature, however, subsequently saw fit to create the Revocation of Paternity Act, MCL 722.1431 et seq. which gives standing for an alleged father to seek an order establishing paternity. The Act was signed into law by Governor Rick Snyder and became effective June 12, 2012.

As stated above, the instant matter was filed May 15, 2013. After serving Defendant-Appellant with the Complaint pursuant to the Revocation of Paternity Act,

Defendant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendant-Appellant argued that Plaintiff-Appellee's matter should be dismissed due to not naming the husband, Christopher Foster, as a party to the action. Plaintiff-Appellee filed a written response to the Motion for Summary Disposition along with a subsequent Motion for Genetic Testing.

On August 21, 2013, the trial court entered an Order denying Defendant-Appellant's Motion for Summary Disposition and granting Plaintiff-Appellant's Motion for Genetic Testing, ordering that the results be sealed and only provided to the Court. The lower court ruled that Plaintiff-Appellee was not required to name Defendant-Appellant. Defendant-Appellant then filed a Motion for Reconsideration on August 28, 2013 of the trial court's denial of the Motion for Summary Disposition. The trial court denied Defendant-Appellant's Motion for Reconsideration on September 13, 2013. On June 16, 2015 the Court of Appeals issued the above referenced opinion and order affirming the denial of summary disposition but remanding the case for the addition of Christopher Foster as a defendant in the lawsuit.

ARGUMENT

- I.** *The Court of Appeals correctly held that a necessary-party defendant, specifically a presumed father under the Revocation of Paternity Act, may be brought into a lawsuit after the expiration of the running of the statute of limitations based upon the relation-back doctrine.*

This Honorable Court has directed the parties to address the appropriateness of the applicability of three cases that concern the relation-back doctrine. Specifically, the cases discuss whether the doctrine extends to the addition of new parties by permitting a party to be added after the expiration of the statute of limitations. The analysis below will support Plaintiff-Appellee's contention that under either of the cases to be discussed, the rationale that he be allowed to add a "necessary party" after the passing of the statute of limitations survives this Court's prior jurisprudence. In sum, the longstanding precedent of both *Casserly v Wayne Circuit Judge*, 124 Mich 157 (1900) and *Prather Engineering Co v Detroit, F & S Ry Co*, 152 Mich 582 (1908) are both still good law and consistent with Plaintiff-Appellee's contention that the addition of the presumed father and husband of Defendant-Appellant relates back to the original filing of this action. Next, the analysis will tend to show that instant matter is distinguishable from *Miller v Chapman Contracting*, 477 Mich 102 (2007) and therefore Plaintiff-Appellee's claim still survives, as it is not in conflict with *Miller*.

A. Casserly v Wayne Circuit Judge, 124 Mich 157 (1900)

The *Casserly* case involved the Union Trust Company's mechanic's lien against various defendants concerning property. Defendants in the actions filed an Answer to the Complaint. However, the key issue of contention concerned adding the principal contractor as a necessary party to the underlying case. Union Trust was allowed by the court to add the principal contractor as a defendant in an amended Complaint. A defendant

then filed an amended Answer whereby they introduced new defenses along with the original answer. Union Trust's motion to strike the defendant's amended Answer was granted in the lower court which prompted the appeal. Among the defenses filed by the relator was that Union Trust could not proceed because the statute of limitations had expired prior to the amended Complaint being filed that added the new party, specifically the principal contractor.

The Court in *Casserly* held that additional necessary parties may be brought into an action after the expiration of the statute of limitations. *Casserly* at 161. Further, the *Casserly* court noted that the amended Complaint related to the original issues contained in the original Complaint and merely added a new party, not a change in the cause of action.

The instant matter is in harmony with the *Casserly* holding whereby the Court of Appeals held that Christopher Foster is a "necessary party" under the Revocation of Paternity Act such that the matter relates back to the original filing and the amendment survives the statute of limitations. Moreover, the Court noted "amendments of this character have generally been allowed." *Casserly* at 161. A key point to the applicability of *Casserly* to the instant matter concerns the fact that the amendment involves adding "necessary parties" as opposed to the addition of claims or defenses under MCR 2.118(D) that the *Miller v Chapman Contracting*, 477 Mich 102 (2007) case was decided upon. As will be discussed in more depth below, *Miller* did not address the issue of the addition of "necessary" parties, therefore it is distinguishable from the instant matter and should not be followed. The Michigan Court of Appeals has further solidified and recognized an exception providing for the addition of a defendant after expiration of the statute of limitations where the new party is a necessary party, in the matter of *Forest v Parmalee*, 60

Mich App 401, 406 (1975). In support of its opinion, the Court of Appeals concluded that generally if a defendant is brought into a lawsuit for the first time upon the filing of an amended complaint, the filing constitutes the commencement of the action with regard to that particular defendant. However, the relevant exception is that an additional defendant may be brought in to an action after the expiration of the limitations period if the new party is a necessary party. *Amer v Clarence A Durbin Assoc, Inc*, 87 Mich App 62, 65 (1978). See also, *O'Keefe v Clark Equipment Co*, 106 Mich App 23, 26-27 (1981). The *Casserly* case specifically mentions that necessary parties may be brought in after the expiration of the statute of limitations which is congruent with the instant matter where the issue concerns adding a necessary party, not just any party to the lawsuit. It is of no import that the *Casserly* case was decided prior to the enactment of MCR 2.118(D) because the court rule does not address the relation-back doctrine relative to the addition of necessary parties anyway.

In sum, there is ample undisturbed precedent for Plaintiff-Appellee's position that he should be allowed to add Foster as a necessary party after the expiration of the statute of limitations under these particular circumstances that are clearly different from the *Miller* case.

B. Prather Engineering Co v Detroit, F & S Ry Co, 152 Mich 582 (1908)

Plaintiff, Prather Engineering, brought suit to enforce a mechanic's lien on real property in Saginaw Circuit Court. Detroit Trust Company had previously filed an action in Genesee Circuit Court. Essentially the Genesee Circuit Court refused to permit the receiver in the matter to be added as a party to the action in Saginaw Circuit Court. Prather Engineering had sought to amend its Complaint in the Genesee matter, which had been

denied in the lower court. Ultimately, the Michigan Supreme Court held that an amendment to plaintiff's Complaint to add a proper party after the expiration of the statute of limitations was allowed. *Prather* at 585.

Based upon the precedent established in *Casserly* and further followed in *Prather*, this Honorable Court should find that an amendment of the Complaint adding Christopher Foster, a presumed father who is also considered a necessary party, is supported by this Court's prior jurisprudence. These cases have not been overturned and should therefore be followed. Not only have these cases not been overturned, but they lack any negative treatment history that would suggest that they not be followed, despite their age. Moreover, these cases do not lose their value or significance due to the mere passage of time. As noted by this Court, "we recognize that following prior decisions of this Court under the doctrine of stare decisis is generally the preferred course of action...". *Singleton v Chrysler Corp*, 467 Mich 144, 161 (2002).

C. *Miller v Chapman Contracting*, 477 Mich 102 (2007).

The *Miller* case involved a situation whereby plaintiff was named in a lawsuit as oppose to his bankruptcy trustee, who was considered the real party in interest. After the expiration of the statute of limitations, defendant in the matter moved for a dismissal for plaintiff's failure to name the bankruptcy trustee in the lawsuit. The plaintiff's motion to amend the Complaint after the limitations period was denied in the lower courts. The Michigan Supreme Court affirmed the lower court's dismissal of plaintiff's lawsuit and adopted the unpublished opinion per curiam of the Court of Appeals.

Plaintiff in *Miller* essentially argued that it should be allowed an opportunity to amend its Complaint in order to correct the misnomer or misidentification of the named

plaintiff. The Court ultimately held that MCR 2.118(D) was applicable to the case, which provided in relevant part that: “An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading”. Moreover, the Court went further by holding that the relation-back doctrine of MCR 2.118 does not extend to the addition of new parties. *Miller* at 105. Of significant note, however, is that the Court indicated that “MCR 2.118(D) specifies that an amendment relates back to the date of the original pleading only if it adds a claim or a defense; it does not specify that an amendment to add a new party also relates back to the date of the original pleading.” *Miller* at 107.

The instant case is distinguishable from the circumstances of *Miller* and therefore should not be bound by its harsh remedy of preclusion of amendments concerning the addition of a party. *Miller* was largely decided upon an interpretation of MCR 2.118(D) which applies to amendments that add a claim or defense. The instant matter does neither. It merely involves adding a necessary party as a defendant. There are several problems with the rationale put forth by *Miller*.

1. MCR 2.118(D) applies to the addition of claims and defenses, not necessary parties

First, *Miller* relied upon MCR 2.118(D) which actually only applies to amendments that add a claim or defense. The rule does not apply to the addition of parties. This is an important distinction in that the instant matter seeks merely to add the husband of the Defendant mother as a party and it does not seek to add new claims at all. Therefore, the instant matter should not be subject to the harsh interpretation of MCR 2.118(D) as not

providing for relation-back of amendments to add parties. The instant matter more appropriately should be analyzed as a matter concerning the addition of “necessary” parties whereby there is ample caselaw to support the notion that an amendment relates back to the original filing of the complaint and may be amended after the expiration of the limitations period where necessary to effectuate the purpose of the relation-back doctrine.

2. MCR 2.118 is silent on the issue of relation-back of added parties, therefore it is inapplicable to the case at bar.

A second issue of particular note is that MCR 2.118(D) is silent on the issue of relation-back of added parties, which was noted in Justice Kelly’s lengthy and well-reasoned dissent in *Miller*. *Id* at 112. Due to the court rule’s silence on the specific issue of relation-back of added parties, the caselaw of *Casserly* and *Prather* should control. This Court has also previously allowed relation-back where there was a change to the named party in the case of *Wells v Detroit News, Inc*, 360 Mich 634, 641 (1960). Again, these cases are on point with the facts of the instant matter and have not been overturned. *Miller*, contrarily, involves an interpretation of MCR 2.118(D) that seeks to read into the rule something that is not in the plain language. For this Honorable Court to follow *Casserly* would not negatively impact MCR 2.118 because the court rule’s relation-back doctrine does not apply to the addition of necessary parties. Therefore, this Court may look to *Casserly* and *Prather* as authority for applicability of the relation-back to the addition of necessary parties that is not addressed by the court. Until such time as the Legislature amends the court rule, cases asserting these particular facts must follow *Casserly* as controlling legal authority.

3. The underlying rationale and purpose of the relation-back doctrine.

Being that the court rules are silent on the relation back of added parties, it is important to analyze and appreciate the underlying purpose of the relation-back doctrine. As further noted in Justice Kelly's dissent, the "purpose of relation back is to deprive defendants of the opportunity to defeat a valid claim by using a legal technicality when the rationale for the statute of limitations has been met." *Miller* (Justice Kelly's dissent) at 113 citing 6 Michigan Law & Practice, Civil Procedure, § 37, pp 69-70; *Smith v Henry Ford Hosp*, 219 Mich App 555, 558 (1996). In sum, the relation-back doctrine has a rich history in Michigan caselaw despite not being specifically provided for under MCR 2.118(D) where the issue concerns the addition of necessary parties to a lawsuit. This can be distinguished from misnomers or parties that have not deemed necessary to a cause of action such as present in the instant matter. *Miller*, contrarily, was decided on the basis of what was deemed a misnomer in not naming the proper plaintiff, not a necessary party defendant as the instant matter involves.

4. Addition of "necessary parties" versus merely added parties must be distinguished and thus afforded the benefit of the relation-back doctrine.

Therefore this Court is essentially left with caselaw that on its face may appear discordant or at odds. Plaintiff-Appellee submits, however, that the instant matter is sufficiently distinguishable from *Miller*. In the instant matter, where Christopher Foster's interests as a presumed father are quite significant and would not be adequately addressed if he were not a party to the lawsuit, it would only be proper for the matter to allow him to be added and relate back to the original filing. Where the additional party is a "necessary party" as opposed to merely a permissive joinder of an added party, the necessary party may be brought in after the limitations period. Moreover, "whether a party seeking to add

parties to the litigation has complied with the court rules so as to entitle him to suspend running of an applicable statute of limitations in favor of an added party, is for determination in the first instance by the trial court.” *Amer v Clarence A Durbin Associates*, 87 Mich App 62, 67 (quoting *Carpenter v Young*, 83 Mich App 145, 268 NW2d 322 (1978)). Of course, in the instant matter, the trial court concluded Foster was not even required to be named at all under the Revocation of Paternity Act. Further, Plaintiff immediately and timely requested that he be allowed to amend his complaint in response to Defendant’s initial motion for summary disposition.

In sum, if a presumed father under the Revocation of Paternity Act has not been named in the action, being that the statute does not specifically require such, he would be cut off from asserting his rights in an action that the Court of Appeals has deemed impacts an important liberty interest relative to the parent-child relationship. If this Honorable Court were to follow Defendant-Appellee’s reading of these cases, it would certainly bode well for Mr. Foster’s own personal interest in not wanting to face the issue of the true paternity of the minor child in this matter because this case would fail due to the running of the limitations period. Conversely, however, if a father who has not originally been made a party *wishes* to be added as a Plaintiff or Defendant to assert his rights after the expiration of the statute of limitations, he would be barred from the case if *Miller* is interpreted to preclude “necessary parties”.

Essentially, if this Honorable Court permits the addition of necessary parties as provided for in *Casserly* and *Prather*, it would not offend the true purpose of the relation-back doctrine and not cut off anyone’s day in court to address an issue as profound as the proper paternity of a child. This, of course, was an issue of such significance that the

purpose of the enactment of the RPA was to provide a greater avenue for a father to assert his rights in a paternity dispute, not cut them off.

Conclusion and Relief Requested

This Honorable should follow the precedent set forth in *Casserly* and *Prather* which provides that the addition of a necessary party may be made after the expiration of the statute of limitations and relates back to the original filing of the complaint. The existing precedent does not conflict with *Miller*, which is distinguishable as noted above.

Plaintiff-Appellee, SHAE KEVIN GRAHAM, respectfully requests that this Honorable Court affirm the Court of Appeal's decision and DENY the application for leave to appeal.

Respectfully submitted,

/s/ DAVID MELTON, JR.

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Dated: March 18, 2016

Proof of Service

The undersigned attorney does hereby state that he caused a copy of Plaintiff-Appellee's Supplemental Brief In Opposition to Defendant-Appellant's Application for Leave to Appeal and Proof of Service concerning the above-referenced matter to be served upon Defendant-Appellant's attorney of record via the Truefiling e-file system and via U.S. Mail delivery to 26677 W. 12 Mile Rd., Southfield, Michigan 48034 on March 18, 2016. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

Respectfully submitted,

/s/ David Melton, Jr.

David Melton, Jr.